SEP 17 2001

No. 01-92

In the Supreme Court of the United States

PETROCHEM INSULATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) reasonably concluded that petitioner committed an unfair labor practice, in violation of 29 U.S.C. 157 and 158(a)(1), by prosecuting a retaliatory and "utterly meritless" lawsuit against labor unions.

2. Whether the Board acted within its authority in ordering petitioner, as a remedy for the unfair labor practice, to reimburse the unions for attorney's fees they incurred in defending against petitioner's suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 240 F.3d 26. The decision and order of the National Labor Relations Board (Pet. App. 21-41) are reported at 330 N.L.R.B. No. 10.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2001. A petition for rehearing was denied on April 16, 2001 (Pet. App. 95-96). The petition for a writ of certiorari was filed on July 16, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to engage in concerted activity "for the purpose of * * * mutual aid or protection." 29 U.S.C. 157.

This Court held in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), that it is an unfair labor practice for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose," but "the offense is not enjoinable unless the suit lacks a reasonable basis." *Id.* at 749. Thus, the National Labor Relations Board (Board) may not halt the prosecution of a suit unless the suit lacks a reasonable basis in fact or law. *Id.* at 748. But "[i]f judgment goes against the employer * * * or if his suit is withdrawn or is otherwise shown to be without merit," and if the Board determines that the suit was filed in retaliation for the exercise of employees' Section 7 rights, then the Board may find that the lawsuit violated Section 8(a)(1) of the Act. *Id.* at 747. If a violation is found, the Board may order any proper relief that would effectuate the policies of the Act, including ordering the employer to reimburse the employees for their attorney's fees and other expenses of defending against the wrongful suit. *Ibid.* (citing 29 U.S.C. 160(c)).

2. In the 1980s, construction unions in northern California began to participate in state regulatory proceedings that involved permit applications by non-union developers and contractors. Pet. App. 2. The unions sought to "advocat[e] regulatory action which will force

construction companies to pay their employees a living wage * * * and to meet their responsibilities to the community and the environment." *Id.* at 3 (quoting union document); see also *id.* at 29-31.

Petitioner is an insulation contractor in California. Pet. App. 3, 81. Petitioner's employees are not unionized. *Id.* at 3. In December 1990, petitioner filed a complaint in the United States District Court for the District of Northern California against a number of construction-industry unions and their attorneys. *Id.* at 3-4, 25, 79, 82 n.3. The complaint sought treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, based on petitioner's allegation that the unions' participation in state regulatory proceedings constituted criminal extortion of developers to use unionized contractors, and caused petitioner to lose work. Pet. App. 4, 79-83.

In April 1991, the district court dismissed petitioner's complaint for failure to state a claim on which relief could be granted. Pet. App. 79-94. The court found that petitioner's RICO claims rested on a "radical misreading" of controlling case law and on "quotations taken out of context." *Id.* at 90-94 & n.10. It held that the Act preempted petitioner's RICO claims because the predicate acts that formed the basis for the claims allegedly were unfair labor practices in violation of Section 8(e) of the Act, 29 U.S.C. 158(e). Those alleged unfair labor practices were within the jurisdiction of the National Labor Relations Board. Pet. App. 84-94. The district court dismissed the complaint without prejudice. *Id.* at 94 & n.11.

Petitioner sought leave to file an amended complaint in which it again sought treble damages, this time under both RICO and the Sherman Act, 15 U.S.C. 1, 2. Pet. App. 4. The district court denied petitioner leave

to file the amended complaint because that pleading was "facially inadequate." *Id.* at 52; see also *id.* at 4. The court granted petitioner leave to file a second amended complaint, but cautioned that any such complaint should be pled in conformity with specific guidelines of the court. *Id.* at 4-5.

Petitioner filed a second amended complaint seeking treble damages under RICO and the Sherman Act. Pet. App. 5, 18. In March 1992, the district court dismissed that complaint for failure to state a claim on which relief could be granted. *Id.* at 50-78. This time, petitioner's RICO claim was based on an allegation that a program through which the unions collected information about new or proposed construction projects was funded out of membership dues in violation of 29 U.S.C. 186. Pet. App. 53. The district court held that the program was lawfully funded under "squarely controlling" precedent, *id.* at 55; that petitioner lacked standing to raise its claim, *id.* at 57-59; and that, despite the court's specific admonition, petitioner had failed to abide by the court's directive for pleading RICO claims, *id.* at 59-60. The court also dismissed petitioner's antitrust claims, holding that—among other inadequacies—petitioner failed to cure pleading defects that the court had identified in petitioner's first amended complaint. *Id.* at 60-76. In dismissing the complaint with prejudice, the district court explained that it had been "enormously patient with [petitioner]," *id.* at 60, and that its "specific admonitions" about amending the complaint "ha[d] not been heeded," *id.* at 76. Finally, the court noted that allowing petitioner's suit to continue through another round of amendments to the complaint "could have the effect of chilling the [unions'] rights to public participation" in state regulatory proceedings. *Id.* at 77.

The United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of petitioner's lawsuit in an unpublished memorandum opinion. Pet. App. 42-49. The court of appeals agreed with the district court that petitioner had failed to allege a violation of 29 U.S.C. 186, and thus could not establish predicate acts that would support the RICO claims, *id.* at 47-49; did not allege sufficient injury to support a Sherman Act Section 1 claim, *id.* at 43-46; and failed to allege that the defendants possessed market power, as would be required for a viable Section 2 claim, *id.* at 46.

This Court denied petitioner's ensuing petition for a writ of certiorari. *Petrochem Insulation, Inc.* v. *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus.*, 510 U.S. 1191 (1994).

3. On May 31, 1996, acting on a charge by the unions that petitioner had sued, the Board's General Counsel issued an administrative complaint against petitioner. Pet. App. 21. The complaint alleged that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by filing and maintaining a meritless lawsuit against the unions for a retaliatory purpose. Pet. App. 22-23.

The Board sustained the complaint. Pet. App. 21-41. The Board first concluded that the unions' participation in state regulatory proceedings was protected by Section 7 of the Act because the unions sought, in part, to secure "the economic terms of employment enjoyed by the employees they represented." *Id.* at 30. The Board determined that the unions also sought to ensure the safety and health of workers at construction sites, and that this was "concerted activity that falls within the 'mutual aid or protection' language of Section 7." *Id.* at 30-31.

The Board next applied this Court's decision in *Bill Johnson's Restaurants*, *supra*, to hold that petitioner's federal-court lawsuit constituted an unfair labor practice because it was "without legal merit" and was "motivated by an intent to retaliate against the Unions' protected concerted activity." Pet. App. 37. The Board explained that the district court's dismissal of petitioner's suit, which the Ninth Circuit affirmed, satisfied the requirement that the suit lacked merit. *Id.* at 29. The Board therefore turned to this Court's additional requirement that the suit must have been filed for a retaliatory purpose. A retaliatory purpose could be inferred, the Board held, from the allegations of petitioner's complaints, from petitioner's repeated inability to plead a legally cognizable cause of action, and from petitioner's exclusive reliance on the treble-damages provisions of RICO and the antitrust laws, when (based on the allegations of the complaint) it could have sued under the federal labor laws to recover its actual damages. *Id.* at 34-37.

As a remedy, the Board ordered petitioner (in relevant part) to reimburse the unions for expenses they incurred in defending against petitioner's lawsuit. Pet. App. 37. The Board noted (*id.* at 38 n.27) that *Bill Johnson's Restaurants* explicitly authorized such a remedy. See 461 U.S. at 747. The Board further emphasized that reimbursement was required, not because petitioner failed to prevail in its district court litigation, but because petitioner's retaliatory filing of the meritless suit was an unfair labor practice under Section 8(a)(1) of the Act, for which the Board was authorized to award relief. Pet. App. 38 n.27.

4. The United States Court of Appeals for the District of Columbia Circuit enforced the Board's order. Pet. App. 1-20. The court of appeals first rejected peti-

tioner's claim that, under *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), unions (as opposed to employees) enjoy no protected Section 7 rights. Pet. App. 6-7. The court explained that "*Lechmere* holds only that non-employee union representatives have no affirmative [statutory] right [under the Act] to trespass on employer property when they could reach the employees through usual off-site channels." *Id.* at 7; see 502 U.S. at 531-541. Noting that it "face[d] no question in this case of union access to private property," the court of appeals agreed with the Board that "it would be a 'curious and myopic' reading of the Act's core provisions 'to hold that, although employees are free to join unions and to work through unions for purposes of other mutual aid or protection,' the conduct of the union they form and join for those purposes is not protected by the Act." Pet. App. 7 (quoting *BE&K Constr. Co.*, 329 N.L.R.B. 717, 724 (1999), enforced, 246 F.3d 619 (6th Cir. 2001)).

Next, the court of appeals upheld the Board's conclusion that petitioner's lawsuit constituted an unfair labor practice under *Bill Johnson's Restaurants*. Pet. App. 11-19. The court explained that under *Bill Johnson's Restaurants*, "if the employer lost, the lawsuit is deemed unmeritorious." *Id.* at 13; see 461 U.S. at 747. The court therefore rejected petitioner's contention that the Board itself should have determined whether petitioner's suit was "baseless," and should not have deemed the district court's disposition of the case conclusive. Petitioner based its argument on *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), in which this Court, quoting *Bill Johnson's Restaurants*, stated that "even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair

labor practice unless such litigation is 'baseless.'" *Id.* at 59 (quoting 461 U.S. at 743-744). The court of appeals agreed with the Board that this sentence addresses only the circumstances under which an active lawsuit may be enjoined, and that "*Bill Johnson's* establishes a different standard for determining whether an adjudicated lawsuit was meritless." Pet. App. 12; see p. 2, *supra*. The court of appeals "underst[oo]d" that *Bill Johnson's Restaurants* "sets the bar" for identifying sanctionable litigation lower under the Act than under the *Noerr-Pennington* doctrine of antitrust immunity. *Id.* at 13. The court concluded, however, that "the language in *Bill Johnson's* must control." *Ibid.*

The court of appeals also upheld the Board's finding that petitioner filed its suit with a retaliatory motive. Pet. App. 13-19. "[T]he lawsuit's complete lack of merit together with [petitioner's] effort to obtain treble damages," the court concluded, was sufficient support for the Board's finding of retaliatory motive. *Id.* at 18-19.

Finally, the court of appeals rejected petitioner's contention that the Board's award of attorney's fees to the unions was inconsistent with the American Rule, under which attorney's fees are not recoverable by the prevailing party in a lawsuit unless a statute or contract so provides. Pet. App. 19-20. The court reasoned that whereas the American Rule addresses the consequences of losing a court action, the Board's award was a remedy for petitioner's unfair labor practice of filing a meritless, retaliatory suit. *Id.* at 20.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

another court of appeals. Further review therefore is not warranted.

1. In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court established one standard governing the Board's authority to enjoin an ongoing lawsuit as an unfair labor practice, and another standard governing the Board's authority to sanction a completed lawsuit. *Id.* at 743-749. Before the Board may enjoin an ongoing suit that is retaliatory, it must find that the suit "lacks a reasonable basis." To sanction the party who brought a completed lawsuit with retaliatory motive, the Board must find that the suit was "unmeritorious," which may be established by the judgment itself. *Id.* at 748-749; see *id.* at 746-747.[1]

In this case, petitioner challenges the Board's application of the completed-lawsuit standard of *Bill Johnson's Restaurants*. See Pet. 14-15. Petitioner contends (Pet. 9-15) that, to determine whether the underlying lawsuit was an unfair labor practice, the Board should have applied the "objectively baseless" standard articulated in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993), and not followed the rule established in *Bill Johnson's Restaurants* (*i.e.*, that a judgment adverse to the plaintiff will support a finding of an unfair labor

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[1] Contrary to petitioner's repeated assertions (*e.g.*, Pet. 9, 12, 20), the standard established in *Bill Johnson's Restaurants* for sanctioning the filing of a completed lawsuit was not dictum. Rather, this Court specifically stated its understanding that some claims in the underlying lawsuit had been dismissed, and it remanded so that the Board could apply the Court's standard for completed litigation to those claims. 461 U.S. at 750 n.15.

practice, when the suit was brought with a retaliatory motive).[2]

Like the District of Columbia Circuit in this case, the other courts of appeals that have considered the issue have uniformly rejected the argument that *Professional Real Estate Investors* overruled *Bill Johnson's Restaurants sub silentio*. See *BE&K Constr. Co.* v. *NLRB*, 246 F.3d 619, 629 (6th Cir. 2001); *White* v. *Lee*, 227 F.3d 1214, 1235-1236 (9th Cir. 2000).[3] *Professional Real Estate Investors* established that, for purposes of antitrust liability, "litigation cannot be deprived of immunity [under the *Noerr-Pennington* doctrine] as a sham unless the litigation is objectively baseless." 508 U.S. at 51. In so holding, the Court noted that the "objectively baseless" test is similar to the "baseless" standard that governs the Board's authority to enjoin an ongoing lawsuit under *Bill Johnson's Restaurants*. *Id.* at 59. But *Professional Real Estate Investors* did not address, much less alter, the standard stated in *Bill*

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[2] Although *Bill Johnson's Restaurants* involved state-court litigation, petitioner does not question the Board's practice of adhering to the rules set out in that case when a federal lawsuit is the basis for an allegation of an unfair labor practice. See Pet. App. 11-12.

[3] Petitioner's assertion (Pet. 15-16) of a conflict between the court of appeals' decision in this case and the Second Circuit's decision in *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62 (1992), is unfounded. In *Vanguard Tours*, the Second Circuit held that, for purposes of applying *Bill Johnson's Restaurants*, a plaintiff's voluntary withdrawal of a state-court lawsuit does not "signif[y] a determination by the state court that the suit was 'without merit.'" *Id.* at 66. This case does not involve a withdrawn lawsuit. Indeed, the *Vanguard Tours* court explained that, where—as here—"the plaintiff has lost on the merits[,] * * * the Board may consider the filing of the suit to have been an unfair labor practice" upon a showing of retaliatory motive. *Id.* at 65.

Johnson's Restaurants for determining whether a *completed* lawsuit constitutes an unfair labor practice. See Pet. App. 12-13; *BE&K Constr.*, 246 F.3d at 629.

Petitioner notes (Pet. 16-21) that the court of appeals in this case, and the Ninth Circuit in *White*, have questioned whether the "unmeritorious" standard of *Bill Johnson's Restaurants* is consistent with the "objectively baseless" standard of *Professional Real Estate Investors*. Any tension between the two standards, however, has no significance in this case. Here, the court of appeals upheld "the Board's principal finding * * * that [petitioner's] suit was utterly meritless." Pet. App. 18; see *id.* at 14-17. Because petitioner's suit was "completely without merit," *id.* at 15, and did not present even a "colorable" claim, *id.* at 14, it was "objectively baseless" under *Professional Real Estate Investors*. See 508 U.S. at 60-61 (lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits" and it is not legally viable). In short, the Board's findings in support of its determination of an unfair labor practice in this case fully satisfy the "objectively baseless" test urged by petitioner.

In any event, there is no clear "anomaly" (Pet. 9) in this Court's rule that, whereas a plaintiff is insulated from antitrust liability for filing a suit so long as it had an objective basis for the suit (even if the litigant does not ultimately prevail), an employer is subject to liability for committing an unfair labor practice if its retaliatory suit fails. The Ninth Circuit has noted that it may be appropriate to have a different rule in the labor-law context than in the antitrust context because of the special economic dependency of employees on their employers. See *White*, 227 F.3d at 1236-1237; see also *Bill Johnson's Restaurants*, 461 U.S. at 740 (noting

that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (discussing circumstances in which employer speech may violate the Act as "a threat of retaliatory action" against the employees' exercise of Section 7 rights). Moreover, a plaintiff who files a lawsuit with an improper motive faces lesser liability under the Act than under the antitrust laws. Compare *Bill Johnson's Restaurants*, 461 U.S. at 747 (Board may award defendants attorney's fees and other appropriate relief) with 15 U.S.C. 15(a) (authorizing treble damages and attorney's fees as remedy for antitrust violations).

2. Petitioner next asserts (Pet. 22-25) that the Board erred in holding that the unions' participation in state regulatory proceedings was protected under Section 7. Petitioner's reliance on *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), as support for that argument is misplaced. As the court of appeals correctly explained (Pet. App. 7), *Lechmere* held only that the Act does not authorize non-employee union representatives to trespass on employer property when the representatives could reach employees through reasonable alternative means. See 502 U.S. at 537-538. This case involves no issue of access to an employer's property. The Court recognized in *Lechmere*, moreover, that Section 7 does protect union activities in some circumstances. *Id.* at 537.

Petitioner likewise is mistaken in suggesting (Pet. 23-24) that the unions were not representing any specific employees when they participated in state regulatory proceedings. The Board found that the unions sought to "force construction companies to pay their employees a living wage, including health and other benefits," and that this is "a form of area-

standards activity * * * undisputedly protected under Section 7." Pet. App. 29-30. The Board additionally found that the unions "acted in furtherance of the safety and health of all employees who would eventually be employed at a particular work site, including potentially the employees [whom] the [u]nions represented"; this, the Board determined, was "concerted activity that falls within the 'mutual aid or protection' language of Section 7." *Id.* at 30-31. The court of appeals concluded that the Board's factual determinations were supported by substantial record evidence. *Id.* at 7-9. Petitioner's objections to the Board's fact-finding raise no issue warranting further review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

3. Finally, petitioner contends (Pet. 25-29) that the Board lacked authority to order petitioner to reimburse the unions for attorney's fees they incurred in defending against petitioner's retaliatory lawsuit. That contention is foreclosed by *Bill Johnson's Restaurants*, which expressly authorizes the Board to award attorney's fees to the targets of retaliatory suits that violate that Act. See 461 U.S. at 747. There is, moreover, no logical inconsistency between the Board's award of attorney's fees as a make-whole remedy for the unfair labor practice of filing an unmeritorious, retaliatory suit, and the rule that courts will not award attorney's fees to prevailing parties in the absence of a statutory directive or enforceable contract. See Pet. App. 19-20. When the Board makes such an award, it is implementing the policies of the Act with respect to the unfair labor practice of filing the meritless, retaliatory suit. It is not revisiting the trial court's orders in the underlying litigation or responding to the employer's simple failure to prevail in the suit. See *Phelps Dodge*

Corp. v. *NLRB*, 313 U.S. 177, 194 (1941) (Board's remedial orders should "restor[e] * * * the situation, as nearly as possible, to that which would have obtained but for the illegal [conduct]").

Summit Valley Industries, Inc. v. *Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982), does not support petitioner's argument. That case established that attorney's fees incurred during earlier Board proceedings "are not a proper element of damages" in a court action brought under Section 303 of the Labor-Management Relations Act, 1947, 29 U.S.C. 187. 456 U.S. at 727. *Summit Valley* did not involve an award of attorney's fees by the Board as a remedy for an unfair labor practice, nor did it present the situation of a party who was forced to defend against a meritless and retaliatory lawsuit. The Court addressed that situation a year later in *Bill Johnson's Restaurants*, which the Board followed in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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